Supreme Court of the United States

October Term, 1957

No. [redacted]38

RAILWAY EXPRESS AGENCY, INCORPORATED,

Appellant

v.

COMMONWEALTH OF VIRGINIA,

Appellee

Appeal from the Supreme Court of Appeals of Virginia

BRIEF FOR THE APPELLANT

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OPINION BELOW

The opinion of the Supreme Court of Appeals of Virginia in this case is reported at 199 Va. 589 and 100 S. E. 2d 785. The opinion of the State Corporation Commission of Virginia has not yet been officially reported. For text of opinion see R. 43.[1]

JURISDICTION

The judgment of the Supreme Court of Appeals was entered December 2, 1957 (R. 81). Notice of appeal to this

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[1] Reference to the pages of the printed transcript of record are made herein as follows: (R. .....). *Italics are supplied unless otherwise indicated.*

Court was filed December 31, 1957 (R. 82), and probable jurisdiction was noted April 14, 1958 (R. 85). The jurisdiction of this Court rests on 28 U. S. C. 1257(2).[2] This case meets the requirement of that statute since the decision was rendered by the highest court of the State of Virginia and held that the Virginia gross receipts franchise tax on express companies was not repugnant to the Commerce Clause of the Constitution of the United States and, in the amount assessed, did not deprive Appellant of its property without due process of law in contravention of the provisions of the Fourteenth Amendment.

QUESTIONS PRESENTED

Appellant, a Delaware Corporation, is engaged in the business of transporting express matter in interstate and intrastate commerce in every state of the United States except the State of Virginia, *where it does solely an interstate business*, having been denied permission to engage in *intrastate* business there because Section 163 of the Virginia Constitution prohibits a foreign corporation from engaging in business characterized as that of "a public service corporation".

In 1954 this Court held a *license* tax then imposed by Virginia upon gross receipts derived by Appellant solely from its interstate business to be a *privilege* and not a *property* tax (Appellant was also subject to and paid all taxes, State and local, on its property in Virginia) and therefore in violation of the Commerce Clause of the Constitution of the United States. *Railway Express Agency, Inc.* v. *Virginia*, 347 U. S. 359. In 1956 the Legislature of Virginia changed the name (though not the incidence) of the tax to a fran-

[2] 62 Stat. 929.

chise tax and imposed the same in lieu of taxes "on the other intangible property" and "rolling stock" of express companies, these being the *only* subjects upon which the *State* may impose a property tax under the provisions of Section 171 of the Virginia Constitution and Section 58-10 of the Code of Virginia.

In 1956 the State Corporation Commission determined the amount of Appellant's interstate gross receipts subject to "franchise" taxation by computing, on a mileage basis, the proportion which its receipts from express transported over certain railroads and airlines *operating in Virginia* bore to the total receipts from express transported by Appellant over the entire lines of *such* railroads and airlines.

Appellant contended before the Commission that the franchise tax (1) was a license or privilege tax and therefore invalid as a burden on interstate commerce, (2) was improperly apportioned to Virginia on a mileage basis, and (3) as a property tax denied Appellant due process of law since it was out of all proportion to the amount of all property taxes in lieu of which it was assessed. The Virginia Commission denied each of these contentions. The Virginia court, affirming the action of the Commission, held that the franchise tax was a property and not a license or privilege tax, that it did not violate the Commerce Clause, and, in the amount assessed by the Commission, did not deprive Appellant of its property without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

Therefore, the questions here presented are —

1. Is the franchise tax an excise or privilege tax upon Appellant's right to transact solely an interstate express

business in Virginia and therefore in contravention of the Commerce Clause of the Constitution of the United States?

2. Is the amount of the franchise tax, imposed upon Appellant for the year 1956 as a property tax, determined in such a manner as to deprive Appellant of its property in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States?

STATUTE INVOLVED

The Franchise Tax is found in Article 4, Chapter 12 of Title 58 of the Code of Virginia, 1950, as amended by the 1956 General Assembly (1956 Acts, Chapter 612), which consists of Code Sections 58-546 through 58-555. The entire article is printed in Appendix A, page 29 of this brief. The same article as it existed in 1954 when it imposed the license tax held unconstitutional by this Court (347 U. S. 359) is printed in Appendix B; page 33 of this brief. The two sections of the present article imposing the franchise tax provide:

> "§ 58-546. *Franchise tax on express companies.*—Each express company doing business in this State shall, on or before the first day of June of each year, pay to the State a franchise tax which shall be in lieu of taxes upon all of its other intangible property and in lieu of property taxes on its rolling stock."
>
> "§ 58-547. *Amount of franchise tax.*—The franchise tax shall be equal to two and three-twentieths per cent of the gross receipts derived from operations within this State. If its operations are partly within and partly without this State, the gross receipts derived from operations within this State shall be deemed to be all receipts on business beginning and ending within this State and all receipts derived from the transportation

within this State of express transported through, into, or out of this State."

STATEMENT

In 1918 the American Railway Express Company was organized at the suggestion of the Director General of Railroads of the United States to enable him to make one operating agreement with it rather than a separate agreement with each of the several independent express companies then operating in the United States. At the suggestion of the Interstate Commerce Commission, Appellant was organized in 1928 by eighty-six of the major railroads of the Nation and in 1929 acquired the properties of the American Railway Express Company (R. 9, 15). Sixty-eight of the railroads now own all of the stock of Appellant (R. 9).

When it was organized, Appellant promptly became qualified to do an *intrastate* and *interstate* business in every state of the United States except Virginia (R. 15). The Virginia State Corporation Commission, however, refused to grant Appellant authority to an *intrastate* business in Virginia because of the prohibition of Section 163 of the State Constitution against any foreign corporation conducting in Virginia the business or exercising any of the powers or functions of a public service corporation (R. 15) (Virginia S.C.C. Reports, 1929, p. 252). That decision was affirmed by the Supreme Court of Appeals of Virginia, 153 Va. 498, 150 S. E. 419 (1929) and by this Court 282 U. S. 440 (1931). As a consequence of the State's own policy, affirmed by these decisions, Appellant has not since 1932 done any business in Virginia which the State has the power to prohibit *but has done only such as it can conduct under protection of the Commerce Clause of the Federal*

Constitution. To handle such intrastate express as falls within the power of the State to control, a separate Virginia subsidiary was organized in 1931 under the name of Railway Express Agency, Incorporated, of Virginia (herein called the Virginia Company). That local company since 1932 has continued to handle all *intrastate* express business and Appellant all *interstate* express business in Virginia (R. 15).

The operating arrangement between the Virginia Company and Appellant is set forth in a written contract made in 1932 and supplemented in 1942 (R. 100, 105). Appellant's operating arrangement with the one hundred seventy-seven railroads over which it handles express shipments (these include the sixty-eight lines that own the stock of Appellant) is set forth in a written contract separately executed by each railroad and known as the "Standard Express Operations Agreement." The current agreements were made in 1954 (R. 13). The form of this agreement which is Exhibit 1 (see original exhibits with the record) follows the pattern of prior agreements. Appellant also has contracts with truck lines, air lines and steamboat lines for express transportation privileges (R. 29).

The Standard Express Operations Agreement with the railroads provides Appellant with exclusive rights to conduct an express transportation business over the contracting railway lines and requires Appellant to pay to the railroads as compensation for their services in transporting its express matter, *all* of its income after operating expenses and other deductions and credits allowable under the Internal Revenue laws (R. 86). The revenue thus received by the railroads operating in Virginia is subject to taxation under Section 58-519 of the Code of Virginia (1950) as a part of their gross receipts.

The Virginia Company has paid all taxes (privilege and property) assessed against it since 1932 and there is no question here concerning *any* tax levied against that Company (R. 16, 92). Prior to 1951 Appellant likewise paid all taxes assessed against it by Virginia but it paid under protest, as a burden on interstate commerce, the license tax levied pursuant to the provisions of Section 58-547 as it existed prior to 1956, and its antecedent sections (R. 22, 90). That tax was called an annual license tax and was imposed, in addition to the property taxes provided for in the Code, *for the privilege of doing business in the State.*

When this Court decided in *Spector Motor Service, Inc.* v. *O'Connor,* 340 U. S. 602 (1951), that a Connecticut tax imposed for the privilege of doing solely an interstate business in that state, measured by net income attributable to such business, violated the Commerce Clause of the Federal Constitution, Appellant for the first time sought refunds from the State Corporation Commission of Virginia of the *license* taxes paid Virginia on the ground that the tax violated the Commerce Clause of the Federal Constitution as applied to Appellant.

The Supreme Court of Appeals of Virginia affirmed the decision of the Virginia Commission that the license tax was a *property* tax *on the intangible elements of value generated by the employment in business of the physical properties of express companies,* and was not violative of the Commerce Clause of the Federal Constitution. *Railway Express Agency, Inc.* v. *Virginia,* 194 Va. 757, 75 S. E. 2d 61 (1953). This Court reversed the decision of the Virginia court on the ground that the tax was in reality a license tax imposed for *the privilege of doing solely an interstate* business in this state and therefore repugnant to the Commerce

Clause. 347 U. S. 359 (1954). The refunds sought for the years 1950 and 1951 were thereupon granted. Similar refunds were made by the Commission for the years 1952 and 1953. No further *license* taxes were assessed against Appellant.

In 1956 Virginia substituted a "franchise tax" for the previously imposed "license tax." The taxes are identical in all material respects: *both are measured by gross receipts,* the rate is the same, and doing business in Virginia is the basis for the liability for the tax. The two taxes differ only in that (i) they have different names, (ii) the "franchise tax" is *in lieu* of, rather than in addition to, certain other *state* property taxes and (iii) the "franchise tax" is not *expressly stated* to be for the privilege of doing business in Virginia.

In its return of property for the year 1956 pursuant to Section 58-548 of the Code of Virginia (R. 110-112, Exhibit 10), Appellant reported that it had no way of determining what part of the receipts derived by it from its business was earned "in business passing through, into or out of this State," as contemplated by the article imposing the franchise tax (Code Section 58-547) (R. 38). From the return it appeared that it owned intangible personal property (money on hand and on deposit) of a value of $120,110.70; tangible personal property (consisting of automotive equipment and trucks) of a value of $239,465.24 and $23,254.39, respectively; office furniture and equipment of a value of $42,884.83, and real estate of a value of $32,850.00, a total property value in Virginia on the taxable date of $458,565.16 (R. 110-112).[3] From the same return

[3] Under the provisions of Section 171 of the Constitution and Sections 58-9 and 58-10 of the Code, *tangible* personal property (except rolling stock) and real estate are segregated for purposes of *local* taxation *only*; the State may tax *intangible* personal property and rolling stock.

it also appeared that the depreciated *nationwide system value* of the same classes of company property was $79,700,426.00 (R. 95-98, 112; see table p. 22, *infra*).

Upon receipt of Appellant's 1956 return of property, the Virginia Commission devised a formula for determining the gross receipts derived by Appellant from its interstate business in Virginia (R. 34, 38, 108) which it ascertained to be $6,499,519., or 1.7% of its total gross system revenue of $387,241,764., and assessed a franchise tax thereon in the amount of $139,739.66, which was paid under protest (R. 37, 28, 110, Exhibit 7).

Appellant then filed a petition under Section 58-672 of the Code of Virginia for correction of the assessment of the 1956 franchise tax and for a refund of the tax paid on the ground that the tax constituted (1) a burden on interstate commerce in violation of the Commerce Clause of the Federal Constitution and (2) the taking of Appellant's property and a denial to it of due process of law under the Fourteenth Amendment to the Federal Constitution.

Prior to 1950 Appellant's express refrigerator cars (the only railroad cars it owned) had been treated by the Virginia Commission as "rolling stock" of a "Freight Car Company" and assessed as such under Article 5, Chapter 12, Title 58 of the Code of Virginia. Because of the limited mileage traveled by such "rolling stock" in Virginia, it had no substantial taxable *situs* in Virginia and the taxes imposed on it were of nominal amounts.[4] However, no tax was imposed upon Appellant's rolling stock (refrigerator cars) for the years 1950-1955 because the Virginia Commission accepted Appellant's contention that it was not a Freight Car Company within the meaning of this section of the Code and that its

[4] In 1943 $2.40, in 1944 88¢, in 1945 $1.60, in 1946 $1.05, in 1947 no assessment, in 1948 $75.10, in 1949 $489.80 (R. 27).

rolling stock was therefore not taxable against it as *such* (R. 27).

The Virginia Commission made no assessment upon Appellant's money or rolling stock for the year 1956 upon the theory that the franchise tax imposed by Section 58-546 was in lieu of any property tax thereon. However, had such a tax been assessed upon its money at the rate of 20¢ on the $100 as imposed by § 58-546 prior to the 1956 amendment, it would have amounted to $252.21. Had the Commission assessed Appellant's express refrigerator cars as "rolling stock" upon the basis employed in the formula applied for determining such taxes in 1950 (on 1949 values), it would have amounted to $427.56 (Ex. 13, R. 113), *an aggregate tax on Appellant's money on deposit and the refrigerator cars as "rolling stock" of $679.77.*

The Virginia Commission held that the franchise tax upon Appellant's gross receipts was a *property* tax *upon the good will or going concern value of its interstate business in Virginia measured by such gross receipts* which the Commission determined on a mileage basis. The Commission also held that the tax *as so assessed* did not constitute a denial to Appellant of due process of law under the Fourteenth Amendment. The Supreme Court of Appeals of Virginia affirmed both findings in its decision of December 2, 1957.

ARGUMENT

I.

The Franchise Tax Violates the Commerce Clause

This case differs from the usual Commerce Clause case since the question of whether the taxpayer is engaged *exclu-*

sively in interstate commerce is not involved. Appellant is a foreign public service corporation and Section 163 of Virginia's Constitution prohibits the conduct of an intrastate business in the State by such a company. *Furthermore, the parties have stipulated and the Virginia Court has affirmed that Appellant has done exclusively an interstate business in Virginia* (R. 68, 88).

The sole question here, involving the Commerce Clause, is whether the franchise tax as applied to Appellant is a *property* tax or a tax on the *privilege* of carrying on an exclusively interstate business in Virginia.

1.

Unconstitutional As a Privilege Tax

If the franchise tax is a privilege tax, then under the decision in *Spector Motor Service* v. *O'Connor*, 340 U. S. 602 (1951), it is clearly unconstitutional as applied to Appellant doing exclusively an interstate business in Virginia. This Court said in that case:

> "This Court heretofore has struck down, under the Commerce Clause, state taxes upon the privilege of carrying on a business that was *exclusively* interstate in character. The Constitutional infirmity of such a tax persists no matter how fairly it is apportioned to business done within the state. *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U. S. 203 (measured by percentages of 'corporate excess' and net income); *Ozark Pipe Line Corp.* v. *Monier*, 266 U. S. 555 (measured by percentage of capital stock and surplus). See *Interstate Pipe Line Co.* v. *Stone*, 337 U. S. 662, 669, *et seq.* (dissenting opinion which discusses the issue on the assumption that the activities were in interstate commerce); *Joseph* v. *Carter & Weekes Co.*, 330 U. S. 422; *Freeman* v. *Hewit*, *supra*." (p. 609)

Thus the *Spector Motor Service* case reaffirmed the principle of the *Alpha* and *Ozark* cases that a state tax, even though fairly apportioned and nondiscriminatory, cannot be levied directly or indirectly on the privilege of doing an exclusively interstate business in the taxing state. This well settled principle was applied by this Court in its decision which held invalid the license tax levied under the earlier Virginia statute. *Railway Express Agency, Inc.* v. *Virginia*, 347 U. S. 359 (1954).

Appellant's only business in Virginia consists of (i) originating the interstate movements which require local pick-up of parcels, (ii) terminating the movements which require delivery, and (iii) movement through the state. This court has frequently held that such local incidents are integral parts of an interstate movement and cannot be the bases for a state license or privilege tax. *Railway Express Agency* v. *Virginia*, 347 U. S. 359 (1954); *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157 (1954); *Memphis Steam Laundry Cleaner, Inc.* v. *Stone*, 342 U. S. 389 (1952); *Spector Motor Service* v. *O'Connor*, 340 U. S. 602 (1951); *New Jersey Bell Telephone Company* v. *State Board of Taxes and Assessments*, 280 U. S. 338 (1930).

Since the business of Appellant in Virginia involves no taxable localized incidents the franchise tax is invalid under the *Spector* case if it is a privilege tax as Appellant contends and as its operating incidents plainly indicate.

The *Spector* case was soon recognized as a long needed reclarification of the limitation on the power of the state to levy taxes on the privilege of carrying on an exclusively interstate business. The principle of this landmark decision has been applied and followed in numerous states, including

Alabama,[5] California,[6] Georgia,[7] Indiana,[8] Mississippi,[9] New York,[10] Pennsylvania,[11] Washington,[12] and West Virginia.[13] The principle has been recognized even where state taxes have been sustained because of what were considered controlling factual distinctions. See e.g., *Fontenot*

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[5] *City of Gadsden* v. *Roadway Express, Inc.*, 37 Ala. App. 613, 73 So. 2d 765 (1954), city license tax invalid as applied to interstate motor carrier; *State* v. *Plantation Pipe Line Co.*, 265 Ala. 69, 89 So. 2d 549 (1956), cert. den. 352 U. S. 943 (1956), state franchise tax invalid as applied to interstate pipeline company.

[6] *National Schools* v. *City of Los Angeles*, 135 Cal. App. 2d 311, 287 P. 2d 151 (1955), cert. den. 350 U. S. 968 (1956), city gross receipts license tax invalid as applied to receipts for correspondence course to out-of-state students.

[7] *Stockham Valves & Fittings* v. *Williams*, 213 Ga. 713, 101 S. E. 2d 197 (1957), cert. granted 356 U. S. 911 (1958) (App. Pend., No. 33, 1958 Term), net income tax invalid as applied to foreign corporation engaged solely in interstate commerce.

[8] *Gross Income Tax Division* v. *Surface Combustion Corporation*, 232 Ind. 100, 111 N. E. 2d 50 (1953), cert. den. 346 U. S. 829 (1953), gross receipts tax invalid as applied to income from sales in interstate commerce.

[9] *Coleman, Attorney General* v. *Trunkline Gas Co.*, 218 Miss. 285, 63 So. 2d 73 (1953), cert. den. 346 U. S. 824 (1953), privilege tax invalid as applied to interstate pipeline company.

[10] *United Piece Dye Works* v. *Joseph*, 282 App. Div. 60, 121 N. Y. S. 2d 683 (1953), aff. 307 N. Y. 780, 121 N. E. 2d 617 (1954), cert. den. 348 U. S. 916 (1955); *United Airlines* v. *Joseph*, 282 App. Div. 48, 121 N. Y. S. 2d 692 (1953), aff. 307 N. Y. 762, 121 N. E. 2d 557 (1954), city gross receipts license tax invalid as applied to businesses engaged solely in interstate commerce.

[11] *Roy Stone Transfer Corporation* v. *Messner*, 377 Pa. 234, 103 A. 2d 700 (1954); *Commonwealth* v. *Eastman Kodak Co.*, 385 Pa. 607, 124 A. 2d 100 (1956), cert. den. 352 U. S. 952 (1956), net income tax, though characterized a "property tax", invalid as applied to foreign corporations engaged solely in interstate commerce.

[12] *B. F. Goodrich Co.* v. *State*, 38 Wash. 2d 663, 231 P. 2d 325 (1951), cert. den. 342 U. S. 876 (1951), gross receipts privilege tax invalid with respect to income from purely interstate sales.

[13] *American Barge Line Co.* v. *Koontz*, 136 W. Va. 747, 68 S. E. 2d 56 (1951), gross receipts privilege tax invalid with respect to receipts from interstate barge operations.

v. *John I. Hay Company*, 228 La. 1031, 84 So. 2d 810 (1956); *Minnesota* v. *Northwestern States Portland Cement Company*, 250 Minn. 32, 84 N. W. 2d 373 (1957), *Prob. Juris. noted*, 355 U. S. 911 (No. 12, 1958 Docket).

Unless the franchise tax is a property tax it is clearly unconstitutional as a violation of the Commerce Clause.

2.

The Franchise Tax Is a Privilege Tax and Not a Property Tax

This Court in the prior appeal analyzed this same tax and held that although levied as a "license tax, in addition to certain property taxes," for the privilege of doing business in Virginia it was "a privilege tax and one which cannot be applied to an exclusively interstate business" (347 U. S. 359, 369). Following that decision three changes were made in the tax by the Legislature of Virginia in an effort to give the statute a gloss of constitutionality but these changes were changes of form and not changes of substance and they did not alter the true nature of the tax, which this Court had condemned as unconstitutional.

(1) The first change was to call the tax a "franchise tax" rather than a "license tax". But this Court has held many times that labels are not controlling and that it will determine for itself the practical operation of the tax.

In *Railway Express Agency* v. *Virginia, supra*, this Court said:

> "While great respect is due these conclusions, it has long been held that in a case involving the line between permissible state taxation of property at its full value,

> including going-concern value, and prohibited taxation of gross receipts from interstate commerce, 'neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect,' *Galveston, H. & S. A. R. Co.* v. *Texas*, 210 U. S. 217, 227, in which inquiry 'we are concerned only with its practical operation.' *Lawrence* v. *State Tax Comm'n*, 286 U. S. 276, 280. See *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 443-444." (p. 363)

In *Wisconsin* v. *J. C. Penney Co., supra,* it was stated, "But the descriptive pigeonhole into which a state court puts a tax is of no moment in considering the constitutional significance of the exaction" (p. 443). See also *Wagner* v. *City of Covington*, 251 U. S. 95 (1919), *Storaasli* v. *Minnesota*, 283 U. S. 57 (1931), *McLeod* v. *Dilworth Co.*, 322 U. S. 327 (1944), *Society for Savings* v. *Bowers*, 349 U. S. 143, 151 (1955), *City of Detroit* v. *Murry Corp.*, 355 U. S. 489 (1958).

(2) The second change is that the tax is now levied "in lieu of", rather than "in addition to", certain other property taxes. But again labels are not controlling. The franchise tax by its very terms *is a direct tax on gross receipts of express companies which measures the extent of the privilege exercised* and not the property value produced by the exercise of the privilege, or any other *property* value as this Court found on the former appeal:

> ". . . But the tax in dispute here does not depend on owning any physical property, nor upon the value thereof, *but would be levied on gross revenues even if the company found some way to dispense with all local, physical property.* The fact that its measure is gross revenue is consistent with a tax on the privilege

> of doing a volume of business which would yield that revenue, just as the Legislature indicated. *But we have declined to regard mere gross receipts as a sound measure of going-concern value in a practical world of commerce, where values depend on profitableness of a business, not merely its volume.* Cf. *United States Glue Co.* v. *Oak Creek*, 247 U. S. 321, 328-329." (p. 367)

See also *Southern Railway Company* v. *Kentucky*, 274 U. S. 76 (1927).

(3) The third change is that the tax is no longer levied *expressly* for the privilege of doing business in Virginia. This, however, can make no difference since the sole basis for levying the tax is that the taxpayer *has done business in Virginia.* Surely the mere dropping of the significant phrase "for the privilege of doing business in Virginia" cannot change the true nature or practical effect of the tax. It conforms to its statutory description as one whose impact is squarely upon *gross receipts,* without consideration of its effect on the value of any of the classes of property recognized in the other sections of the statute.

Thus the privilege tax, once called a "license tax" and now called a "franchise tax", is for all practical purposes the same tax which this Court held unconstitutional on the former appeal.

The determining factor in this Court's decision in the prior appeal (which, significantly, neither the Virginia Commission nor the Supreme Court of Appeals dealt with in their opinions in this case) is the principle that a direct tax on gross receipts, as distinguished from a net income or *ad valorem* tax, does not measure property values and therefore simply *is not a property tax.* Nowhere has this basic differ-

ence been more clearly recognized and stated than by this Court in *United States Glue Co.* v. *Oak Creek*, 247 U. S. 321 (1918):

> "The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large." (p. 328-329)

While the Virginia Commission and Supreme Court of Appeals held that the franchise tax was a tax upon the intangible *property* of Appellant represented by the going-concern value of its business in Virginia which is wholly interstate, and is levied in lieu of state taxes on Appellant's intangible property and "rolling stock", *the amount of the tax is determined by the statute* to be "two and three-twentieths per cent of the gross receipts derived from operations in this state" precisely as was the case in the tax considered and held invalid on the prior appeal.

It is significant that the Virginia Commission did not determine the amount or value of the intangible property in lieu of which the tax on gross receipts is imposed, and there is therefore no amount—expressed in dollars—spe-

cifically appearing in the record from which it can be determined *what* was found to be the going-concern value of Appellant's business in Virginia. Its failure to do so is readily explained by its own action in the actual assessment of the tax against Appellant where it included the statement "Gross receipts to be taxed—$6,499,519" (R. 109).

The tax is therefore levied *in direct proportion to the extent to which the Virginia Commission found that the privilege of carrying on Appellant's interstate business is exercised in Virginia.* The tax has no relation to the value (net profits) produced by the conduct of that interstate business. Since the tax must be paid regardless of whether the operations of the Company produce *value* by operating at a profit, or produce *no value by operating at a loss, it is necessarily on the privilege of doing an interstate express business and nothing else.*

The Virginia Court held that the principal element of intangible property value of Appellant which is sought to be taxed is its exclusive express privileges on the Nation's railroads acquired under the Standard Express Operations Agreement which is described as "an absolute national monopoly". No one would question the fact that Appellant's exclusive express privileges on the railroads are valuable contract rights. But the patent fallacy in the reasoning of the court is that gross receipts do not measure or even indicate the *value* of those contractual rights. Gross receipts only reflect the *extent* to which those rights are exercised, however unprofitably.

Actually, the Standard Express Operations Agreement requires *all* revenue of Appellant to be paid over to the owning railroads after operating expenses and other allowable deductions and credits under the Federal Internal Revenue laws (R. 86). However, Virginia does not suffer in conse-

quence for the payments by Appellant to the railroads doing business in Virginia constitute a part of *their* gross receipts and are taxable as such under Section 58-519 of the Code of Virginia (1950).

There is no showing in the record that the payments by Appellant to the railroads under the Standard Express Operations Agreement are adequate to compensate them for the actual cost of transporting Appellant's express shipments. Manifestly, a tax of $139,739.66 determined by apportioning Appellant's gross receipts is not a measure of the value of Appellant's exclusive express privileges. So far as the record in the case discloses these privileges, these contractual rights, may be without monetary value.

In short, gross receipts are absolutely no measure of property values, above all the value of a contractual right to exercise a privilege. Therefore, the franchise tax is not in fact a property tax but a tax which every express company which does business in Virginia is required to pay *in proportion to the extent the privilege or right is exercised. The gross receipts of such companies measure only the extent of the business done, not the values, if any, produced by the conduct of the business.*

While the power to tax is inherent in the states, they have delegated to the United States the exclusive power to regulate the privilege of engaging in interstate commerce by including the Commerce Clause in the Constitution (U. S. Const., Art. I, Section 8, Cl. 3). This constitutional separation of the federal and state powers makes it essential that no state be permitted to exercise, without authority from Congress, those functions which it has delegated exclusively to Congress. Therefore, since the franchise tax as applied to Appellant is in reality a tax for the *privilege* of doing business in Virginia and not a *property* tax, it is in

contravention of the Commerce Clause and therefore invalid.

II.

If the Franchise Tax Is a Property Tax, It Violates the Due Process Clause of the Fourteenth Amendment As Applied to Appellant.

When Appellant was before this Court previously the only issue presented was the validity under the Commerce Clause of the tax as a *license* tax measured by a percentage of its gross receipts pursuant to a predetermined formula. No question was then raised as to the *amount* of the tax or the method of assessment. In the present case, however, the constitutionality of the amount has been raised, and the issue posed that even if the tax is considered to be a property tax and thus otherwise constitutionally valid, does the amount or the manner in which it was assessed deprive Appellant of its property without due process of law?

1.

The Method of Apportioning Appellant's Gross Receipts to Be Taxed Results in Taxing Property Outside Virginia in Violation of the Due Process Clause of the Fourteenth Amendment.

The Virginia Court held that the franchise tax imposed by Section 58-546 of the Code (i) was enacted pursuant to Section 170 of the State Constitution which authorizes the imposition of "state franchise taxes" on transportation, industrial or commercial corporations and provides that in imposing such taxes the Legislature may make them *in lieu* of taxes upon other property, in whole or

in part, of such corporations, and (ii) is a tax on the intangible property of Appellant representing the good will or going-concern value of its interstate business in Virginia (R. 70-78). It is most significant, however, that the Commission did not attempt to ascertain or to assess the value of *that* element of Appellant's intangible property. On the contrary, in apparent recognition of the true nature of the tax, the Commission made its assessment against Appellant in the following manner:

"Gross receipts to be taxed	$6,499,519
Tax at 2.15%	$ 139,739.66".
	(R. 109)

Since Appellant had no way of determining and therefore was unable to report for taxation, the amount of its gross receipts earned "in business passing through, into or out of" Virginia as required by Section 58-547 of the Virginia Code (Rec. p. 38), the Commission devised a formula for ascertaining such gross receipts. In making this determination, the Commission applied to Appellant's total *system* gross receipts a factor equal to the proportion which the mileage *in Virginia* of the major railroads and airlines over which express is shipped by Appellant in this State bore to the total system mileage of all *such carriers* (R. 108). The resulting $6,499,519 of gross receipts is 1.7% of Appellant's total gross revenue in 1955 of $387,241,764 (R. 108). This result is so arbitrary and unreasonable as to amount to a denial of due process. This is demonstrated by the following table which shows that of Appellant's *total* assets *of like class as those located in Virginia* (of $79,700,426) only $475,665, or less than 0.6% was situated in Virginia in 1956.

Comparison of System and Virginia Property Values of Like Kind as of December 31, 1955

			SYSTEM VALUES*	VIRGINIA VALUES†
Cash			$34,610,796	$120,110
Real Property				
Land		$4,983,791		
Bldgs.	$13,478,776			
Less Depreciation	6,550,618			
		6,928,158		
			11,911,949	32,850
Rolling stock	$17,876,761			
Less Depreciation	2,481,815			
			15,394,946	17,102
Automotive equipment	$32,566,698			
Less Depreciation	18,979,174			
			13,587,524	239,465
Trucks	$ 3,296,475			
Less Depreciation	2,259,707			
			1,036,768	23,254
Office furniture and equipment	$ 4,673,550			
Less Depreciation	1,515,107			
			3,158,443	42,884
Total			$79,700,426	$475,665

*R. 95, 97, 98, 112.
†R. 111, 113.

It is apparent that in making the assessment of the franchise tax against Appellant, the Virginia Commission in effect decided, and the Virginia Court held, that Appellant's properties in this State *are three times more productive* of gross receipts than is its property of like kind as a whole. There is no reasonable basis upon which such a conclusion could be based and therefore the Virginia Commission established and the Virginia Court upheld a valuation of Appellant's *intangible* property attributable to Virginia, that reflects the value of other property beyond the taxing jurisdiction of the State.

As previously pointed out, the Commission concluded, and the Virginia Court held, that the foregoing property, tangible and intangible, did not reflect the so-called worth arising from the going concern or use value of Appellant's system, or interstate business in Virginia. If the business of Appellant in or out of this State has good will or going concern value over and above its other tangible and intangible property, such going concern value in Virginia would have to amount to $27,947,932 in order to produce an intangible personal property tax of $139,739.66 computed at Virginia's intangible personal property rate of 50¢ for each $100 of value. It taxes the credulity of anyone to believe that the Appellant's property in Virginia alone has an intangible (going concern) value of $27,947,932 when its tangible assets in Virginia total only $475,665. If so, the *intangible* (going concern) value of the Appellant's property *wherever located*, if ascertained by applying the Virginia rate (50¢ on the $100 of value) on intangibles to a tax of $8,325,698 (at 2.15 per cent of the Appellant's *total* gross operating revenues of $387,241,764) would have a value of $1,677,992,260. Manifestly, total corporate assets of only $138,621,859 can have no such good will or going concern value and Virginia therefore is seeking to tax the property of Appellant located outside of this State.

In attempting to tax the going concern or use value of Appellant's tangible assets—an added value which results from the utilization of these assets in a nationwide express business—the Virginia Court has over-looked the fact that such going concern or use value *must be regarded as spread among the various states in the proportions in which the tangible assets are distributed.* The decisions of this Court establish quite clearly that no mileage formula, or other device, may be used to ascribe to one state a disproportionate part of the value of an interstate system and that an attempt to do so is in effect the taxation of property outside the jurisdiction of the state in violation of the due process clause of the Fourteenth Amendment. *Fargo* v. *Hart,* 193 U. S. 490 (1904); *Oklahoma* v. *Wells, Fargo & Co.,* 223 U. S. 298 (1912); *Illinois Central R. R. Co.* v. *Greene,* 244 U. S. 555 (1917). See also *Panhandle Eastern Pipe Line Company* v. *Michigan,* 346 Mich. 50, 77 N. W. 2d 249 (1956).

This is precisely what Virginia has done in the instant case. As we have seen there were ascribed to Virginia, where only 0.6% of Appellant's property is located, gross receipts amounting to 1.7% of Appellant's total gross revenue and, consequently, the same proportion of the total going concern value of all of Appellant's assets. It must follow that Virginia claims that Appellant's property over which it has jurisdiction is proportionately almost three times more productive of revenue than all its other assets of like kind wherever located and that therefore this property has a going concern value three times greater than its similar property located anywhere else in the nation. There is clearly no basis for any such unrealistic claim.

Any system or method of state taxation which produces such an unjust and discriminatory result as has been accomplished by the assessment of the franchise tax in the instant

case is invalid under the doctrine announced in the foregoing authorities and deprives Appellant of its property without due process of law in violation of the Fourteenth Amendment of the Federal Constitution.

2.

THE FRANCHISE TAX ASSESSED AGAINST APPELLANT IS NO JUST EQUIVALENT OF THE TAX IN LIEU OF WHICH IT WAS IMPOSED AND THEREFORE VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Apart from the arbitrary and unfair apportionment formula by which it was assessed, the amount of the tax alone establishes its illegality. The franchise tax by its own terms is declared to be in lieu of taxes upon all the "other intangible property" and "rolling stock" of express companies. This Court has frequently stated that such an in lieu tax however determined will be upheld only if the tax does not exceed the amount of an ordinary property tax in lieu of which such tax is imposed. *Postal Telegraph Cable Company* v. *Adams*, 155 U. S. 688, 696 (1895); *Cudahy Packing Co.* v. *Minnesota*, 246 U. S. 450, 453 (1918); *Pullman* v. *Richardson*, 261 U. S. 330, 338 (1923). The principle has also been recognized by this Court in *Northwestern Mutual Life Insurance Company* v. *Wisconsin*, 247 U. S. 132 (1918); *Alpha Cement Company* v. *Massachusetts*, 268 U. S. 203 (1925); *Great Northern Railway Company* v. *Minnesota*, 278 U. S. 503 (1929). See also 51 Am. Jur., *Taxation*, Section 872, page 778.

Under Virginia's system of segregation of property for state and local taxation authorized by Section 171 of its Constitution and implemented by Sections 58-9 and 58-10 of the Code of 1950, the only property of the Appellant in Virginia which the state (as distinguished from the localities) had the power to tax was (i) $120,110.70 of

cash on hand and on deposit (R. 112) which, at the rate applied to Appellant (prior to the 1945 amendment of § 58-546) of 20¢ per $100 of value would have produced a tax of $252.21 and (ii) Appellant's "rolling stock" which would have produced a tax of $427.56 (See p. 9, *supra*), a total tax of $679.77. The Commission made no assessment upon either class of such property (money and rolling stock) for the year 1956 upon the theory that the franchise tax imposed by Section 58-547 was in lieu of any *property* tax thereon.[14] *Plainly a franchise tax of $139,739.66 was no just equivalent of such property taxes at ordinary rates.*

The foregoing comparison does not take into consideration any enhancement of value of such property (money and rolling stock) *because of its use in a going concern,* but money has no going concern value—it will buy only so much in goods or services whether used by a successful business, or one which has no good will. And even if all of Appellant's property, except money, in Virginia, including tangible property and real estate which the state under its system of segregation of property for state and local taxation is forbidden to tax, is taken into consideration, the total value of all such property ($325,555) certainly cannot be said to have a going concern value of $27,947,932 *which would be the value necessary to produce* a tax of $139,739.66 at the

[14] Neither did the Commission make any assessment of the value of the Company's "automotive equipment" and "trucks" as tangible personal property since it changed its traditional classification of such property in 1956 from *tangible* personal property (subject to local taxation only) to "rolling stock," thus attempting to increase the value of the property subject to State taxation in lieu of which the franchise tax was said to be imposed. The total value of such "automotive equipment" and "trucks" was $262,719.63, and even if treated as "rolling stock" subject to State taxation (at the rate of $2.50 on the $100 of value heretofore imposed upon such property) the additional tax, in lieu of which the franchise tax imposed by Section 58-546 was assessed, would have been only $6,567.99.

ordinary rate of tax on intangibles (50¢ per $100 of value).

Because the tax imposed so grossly exceeds what would be a tax at ordinary rates on Appellant's property in Virginia even when valued as part of a going concern, it cannot be regarded as a valid *in lieu* tax, since it obviously reaches Appellant's property located outside Virginia and is therefore, under the prior decision of this Court cited above, unconstitutional and void under the due process clause.

CONCLUSION

In conclusion it is respectfully submitted that:

1. The franchise tax imposed by §58-547 of the Code of Virginia is unconstitutional and void in that it imposes a *privilege* tax on Appellant's right to do solely an interstate express business in Virginia and thus contravenes the Commerce Clause of the Federal Constitution.

2. Appellant's tangible and intangible property in Virginia does not warrant the imposition of a franchise tax of $139,739.66 as a *property* tax on the going concern value of its interstate business in this State. Such tax is therefore unconstitutional and void in that it deprives Appellant of its property without due process of law in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

3. The franchise tax in the amount of $139,739.66 is unconstitutional and void since when measured by Appellant's interstate gross receipts, is greatly in excess of what would be legitimate as an ordinary property tax upon the intangible property and rolling stock of Appellant *in lieu* of which such franchise tax is imposed.

For one or all of the foregoing reasons the judgment and order of the Virginia State Corporation Commission assess-

ing Appellant with the franchise tax in the amount of $139,739.66 for 1956 and the decision of the Supreme Court of Appeals of Virginia approving such assessment should be reversed, the assessment corrected and expunged from the assessment records and the amount of the tax refunded to Appellant.

August 21, 1958

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APPENDIX A

THE FRANCHISE TAX

Article 4, Chapter 12, Title 58 of the Code of Virginia (1950) as Amended by an Act of the General Assembly of Virginia Approved March 31, 1956 (Acts, 1956, Chapter 612)

Article 4, Chapter 12, Title 58 of the Code of Virginia (1950) as amended by an act of the General Assembly of Virginia approved March 31, 1956 (Acts, 1956, Chapter 612):

EXPRESS COMPANIES

§ 58-546. Franchise tax on express companies. — Each express company doing business in this State shall, on or before the first day of June of each year, pay to the State a franchise tax which shall be in lieu of taxes upon all of its other intangible property and in lieu of property taxes on its rolling stock.

§ 58-547. Amount of franchise tax. — The franchise tax shall be equal to two and three-twentieths per cent of the gross receipts derived from operations within this State. If its operations are partly within and partly without this State, the gross receipts derived from operations within this State shall be deemed to be all receipts on business beginning and ending within this State and all receipts derived from the transportation within this State of express transported through, into, or out of this State.

§ 58-548. Annual report. — Each express company shall report annually on or before the fifteenth day of April to the Commission on forms furnished by the Commission the facts called for on the forms to enable the Commission to assess the annual franchise tax and the value and location of its real estate and tangible personal property other than rolling stock belonging to it as of the beginning of the first day of January preceding.

§ 58-549. Assessments by Commission. — The Commission shall, after thirty days' notice previously given by it to the company, assess the franchise tax and the value of

the real estate and tangible personal property other than rolling stock. Should any company fail to make the report required by this article on or before the fifteenth day of April the Commission shall make the assessments upon the best and most reliable information that it can procure. In the execution of such duty the Commission shall be empowered to take testimony, summon and compel the attendance of witnesses and send for persons and papers.

§ 58-550. Copies of assessment for Comptroller and company. — A certified copy of the assessment when made shall be immediately sent by the clerk of the Commission to the Comptroller and to the company.

§ 58-551. Copy of assessment for local authorities.—The clerk of the Commission shall furnish to the council of every city and town and to the board of supervisors or other governing body of every county wherein is situated real estate and tangible personal property other than rolling stock belonging to the company a certified copy of the assessment of the value of such property. The assessment shall show the character of the property and its value and location for the purpose of taxation in such city, town, county and district, so that city, town, county and district levies may be imposed upon the same at the same rate or rates as are imposed upon other real estate and tangible personal property located in such localities.

§ 58-552. Payment of State tax. — Such company shall pay into the State treasury by the first day of June following the assessment the franchise tax assessed against it.

§ 58-553. No other taxes on express companies; exceptions. — The taxes imposed by this article and authorized to be imposed shall be in lieu of all other taxes and of all licenses, State, county and municipal, upon such companies,

except that nothing herein contained shall exempt the companies from the payment of any motor vehicle license or any motor vehicle fuel tax, heretofore or hereafter imposed by law, or the annual registration fee.

§ 58-554. Penalty for failure to pay. — Any express company failing to pay its franchise tax by the first day of June following the assessment shall incur a penalty thereon of five per cent, which shall be added to the amount of the tax.

§ 58-555. Penalty for failure to report. — Any such company failing to make the report required by § 58-548 within the time prescribed shall be liable to a fine of not more than one hundred dollars for each day such company may be in default in making such report, the fine to be imposed and judgment entered therefor by the Commission after thirty days' notice to the defendant by rule to show cause.

APPENDIX B

THE LICENSE TAX

Article 4, Chapter 12, Title 58 of the Code of Virginia (1950)

Article 4, Chapter 12, Title 58 of the Code of Virginia (1950)

§ 58-546. Taxes on property of express companies.—Each and every one of the express companies doing business in this State shall, on or before the first day of October of each and every year, pay to the State and to the several counties, cities and towns of the State wherein they have taxable properties located, the taxes levied on such property as follows:

(1) The State tax on the intangible personal property (other than shares of stock, and bonds issued by counties, cities and towns or other political subdivisions of this State) owned by every such company shall be at the rate of fifty cents on every one hundred dollars of the assessed value thereof;

(2) The State tax on the money of every such company shall be twenty cents on every one hundred dollars of the assessed value thereof;

(3) There shall be no local levies assessed on such intangible personal property or money;

(4) On the real estate and tangible personal property of every such company there shall be local levies at the same rate or rates as are assessed upon other real estate and tangible personal property located in such localities, the proceeds of which local levies shall be applied as is provided by law.

The provisions of this section shall apply to the assessment for the tax year nineteen hundred forty-nine and annually thereafter, unless otherwise provided by law. (1919, p. 69; 1926, p. 955; 1928, p. 150; Tax Code, § 219; 1948, p. 923.)

§ 58-547. Annual license tax.—Every such company for the privilege of doing business in this State, in addition to the annual registration fee and the property tax as herein provided, shall pay an annual license tax as follows:

The tax shall be equal to two and three-twentieths per centum upon the gross receipts from operations of such companies and each of them within this State. When such companies are operating partly within and partly without this State, the gross receipts within this State shall be deemed to be all receipts on business beginning and ending within this State and all receipts earned in this State on business passing through, into or out of this State; provided, unless otherwise clearly shown, such last-mentioned receipts shall be deemed to be that portion of the total receipts from such business which the entire mileage over which such business is done bears to the mileage operated within this State.

The provisions of this section shall apply to the assessment for the tax year nineteen hundred forty-nine and annually thereafter, unless otherwise provided by law. (1919, p. 69; 1926, p. 955; 1928, p. 150; Tax Code, § 219; 1948, p. 924.)

§ 58-548. Annual report.—Every company doing an express business in this State on any railroad, steamboat, vessel, bus, truck, aircraft of any kind or on any other kind of vehicle or instrumentality of transportation shall report annually on or before the first day of May to the Commission all of its real and personal property of every description in this State belonging to it as of the beginning of the first day of January preceding showing particularly in what city, town, county and school district the property is located and classifying the same under the following heads:

(1) All of its real and personal property of every description in this State showing the cost and market value of such property;

(2) The total number of miles operated within and without this State for the year ending December thirty-first next preceding;

(3) The gross receipts from operation entirely within this State and if operations are partly within and partly without this State the entire gross receipts from operation for the year ending December thirty-first next preceding;

(4) Any and all other information, in such manner and in such detail as the Commission shall require. (1928, p. 148; 1942, p. 408; Tax Code, § 218.)

§ 58-549. Assessment of value of property.—The Commission shall, after thirty days' notice previously given by it to the president or other proper officer, assess the value of the property of each of such companies.

Should any such company fail to make the report required by this article on or before the first day of May the Commission shall, at such time as it may elect, upon the best and most reliable information that can be procured, assess the value of the property of the company within this State and shall ascertain the information required herein. In the execution of such duty the Commission shall be authorized and empowered to take testimony, summon and compel the attendance of witnesses and send for persons and papers. (1928, p. 149; 1942, p. 409; Tax Code, § 218.)

§ 58-550. Copies of assessment for Comptroller and company.—A certified copy of the assessment when made shall be immediately forwarded by the clerk of the Commission to the Comptroller and to the president or other proper officer

of each such company. (1928, p. 149; 1942, p. 409; Tax Code, §218.)

§58-551. Copy of assessment for local authorities.—The clerk of the Commission shall furnish to the council of every city and town and to the board of supervisors or other governing body of every county wherein the property belonging to the company is situated a certified copy of the assessment made by the Commission of such company's property. The assessment shall definitely show the character of the property and its value and the location for the purpose of taxation in each city, town, county and district, so that city, town, county and district levies may be imposed upon the same. (1928, p. 149; 1942, p. 409; Tax Code, §218.)

§58-552. Payment of tax.—Such company shall pay into the State treasury by the first day of October following the assessment the taxes assessed against it. (1928, p. 149; 1942, p. 409; Tax Code, §218.)

§58-553. No other taxes on express companies.—The amount of taxes and licenses imposed by this article and authorized to be imposed shall be in lieu of all other taxes and licenses, State, County and municipal, upon all the property, franchises and privileges of such companies; provided, that nothing herein contained shall exempt the companies from the payment of any motor vehicle license or any motor vehicle fuel tax, heretofore or hereafter imposed by law. (1919, p. 69; 1926, p. 955; 1928, p. 150; Tax Code, §219; 1948, p. 924.)

§58-554. Penalty for failure to pay.—Any such company failing to pay such taxes into the State treasury within the time herein prescribed shall incur a penalty thereon of

five per centum, which shall be added to the amount of the taxes. (1928, p. 149; 1942, p. 409; Tax Code, § 218.)

§ 58-555. Penalty for failure to report.—Any such company failing to make the report required by § 58-548 within the time herein prescribed shall be liable to a fine of not less than twenty-five dollars nor more than one hundred dollars for each day such company may be in default in making such report, the fine to be imposed and judgment entered therefor by the Commission after thirty days' notice to any such defaulting company to appear before the Commission and show cause, if any, against the imposition of such fine, subject to appeal to the Supreme Court of Appeals of Virginia. (1928, p. 149; 1942, p. 409; Tax Code, § 218.)